IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 318 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

COMMISSIONER OF INCOME-TAX

Versus

SHREYAS CHINUBHAI

Appearance:

MR B.B. NAYAK, with MR MANISH R BHATT for Petitioner

MR JP SHAH with MR MANISH SHAH for Respondent

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE KUNDAN SINGH

Date of decision: 18/04/98

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The Income Tax Appellate Tribunal, Ahmedabad has referred the following three questions for the opinion of this Court under Section 256(1) of the Income Tax Act, 1961.

1. "Whether on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the amount of Rs. 1,25,092/- received by the assessee on retirement from the Partnership firm of M/s. Arun Corporation (Estate Division) was not liable to tax under Section 28(iv) of the Act?"

2. "Whether on the fact and in the circumstances of the case the Tribunal was right in law in coming to the conclusion that the sum of Rs. 1,25,092/- received by the assessee onretirement from the partnership firm of M/s. Arun Corporation (Estate Division) was not liable to tax under Section 45 of the Act?"

3. "Whether on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the sum of Rs. 1,25,092/- was not liable to tax as being the adventure in the nature of trade?"

2. The relevant Assessment Year is 1975-76. The assessee was an owner of 202 sq.yards of land at Kalupur, Ahmedabad. On 1.12.1971, the assessee was admitted to the benefits of Partnership, which was constituted under the deed dated 4.12.1971. The business of the firm was to purchase and sell immovable properties, to construct buildings on lands purchased and to sell the same. On 23.12.1994, a fresh partnership deed was drawn by which new five partners were taken in the firm. On 14.2.1975 a deed of retirement was executed as per which the five new partners who were inducted under the Partnership deed dated 23.12.1974, took over the business of the firm as the going concern and the other partners went out of the firm. The stock in trade was determined and after adjusting the opening value thereof, the balance was credited to the accounts of the outgoing partners as a result of which the assessee got his share of Rs. 1,25,092/-. In this connection, the ITO held that the said amount was an income from adventure in the nature of trade and that induction of new partners was merely a device to transfer their assets to the new partners. It was held that the said amount credited to the assessee's account was liable to tax as business income being adventure in the nature of trade or in the alternative, it was taxable under Section 28(iv) of the said Act. The CIT (Appeals), however, accepted the assessee's case and held that the impugned amount cannot be taxed as business income being adventure in the nature of trade, nor could it be taxed under Section 28(iv) of the Act. In the

appeal filed by the Revenue before the Tribunal, it was held that in view of the decision of this Court in CIT Vs. Alchemic Pvt.Ltd., reported in 130 ITR 168, provisions of Section 28(iv) of the Act, were not applicable. Relying upon the decision of this Court in CIT Vs. Mohanbhai Pamabhai, reported in 91 ITR 393, the Tribunal held that the said amount was not exigible to capital gains tax. It was also held that the amount was not taxable as business income as an adventure in the nature of trade. The appeal was therefore, dismissed.

3. There is no dispute about the fact that the land in question was treated as stock in trade of the firm. The value of the land was credited to the capital account of the assessee at the time when it was contributed by the assessee as his share in capital in the said firm. The deed of retirement was executed on 14.2.1975, as a result of which the assessee, as a retiring partner, received the said amount in his share. The question for our consideration is whether the said amount was taxable either as benefit in the course of business under Section 28(iv) of the Act or as capital gains under Section 45 or as business income of adventure in the nature of trade. In CIT Vs. Alchemic Pvt.Ltd. (supra), this Court while construing the provisions of Section 28(iv) of the Act, held that it is only if the benefit or the perquisite is not in cash or money, but is non-monetary benefit or non-monetary perquisite that the question of including the value of such benefit or perquisite would ever arise. It was held that Section 28(iv) would not apply when the amount received is in cash or is considered in terms of money. In the case of CIT Vs. Smt. Chetanaben B.Sheth, reported in 203 ITR 24, it was held by this Court that the amount that had fallen to the share of the assessee partner on dissolution in the assets of the partnership firm, could never be equated with the benefit accruing to the partner under the provisions contained in Section 28(iv) of the Act. Questions similar to the aforesaid question Nos. 1 and 2 were also dealt with by this Court in Income Tax Reference No. 111 of 1974 decided on 4th September, 1975, in which it was held that when at the time of retirement the only thing which the partner gets, was the share in the partnership firm, which he receives in terms of money, tThe amount so received can under no circumstances be said to be a benefit received by the assessee from business under Section 28(iv) of the Act. In view of the settled legal position, we hold that the Tribunal was right in concluding that the amount in question received by the assessee on retirement from the firm was not liable to tax under Section 28(iv) of the Act and the question No.1 is answered in the affirmative

against the Revenue.

4. The question whether such amount received by a partner on retirement from the firm would be liable to tax for capital gains under Section 45 of the Act, is also no longer res-integra. In CIT Vs. Anand Narhar Nimkar (HUF), reported in 224 ITR 221, it was held by this Court that receipt of any sum by a partner on his retirement from the firm or on dissolution of the firm as value of his share in the assets of the firm, does not involve any transfer of capital asset resulting in accrual or receipt of income chargeable to tax as capital gain in the hands of the retiring partner. This Court had already settled this point in CIT Vs. Mohanbhai Pamabhai (supra), in which it was held that when an assessee retires from a firm and receives an amount in respect of his share in the partnership, there is no transfer of interest of the assessee in the goodwill of the firm and no part of the amount so received by him would be assessable to capital gain tax under Section 45 of the Act. In view of this settled legal position, we are of the opinion that the Tribunal was right in concluding that the said amount was not liable to capital gains tax and question No.2 is accordingly answered in the affirmative against the Revenue.

5. As regards the third question, admittedly the assessee had contributed the land in the partnership firm by treating it as stock in trade and thereafter, it had become the asset of the firm. The assessee was given the amount in question as his share in the firm, which he was entitled to get on his retirement and which at that point of time was directly relatable to the land which he had contributed as stock in trade at the time of his entry in the firm. The Tribunal was therefore, right in holding that the said amount was not liable to tax as income from an adventure in the nature of trade. Question No.3 is accordingly answered in the affirmative against the Revenue.

The reference stands disposed of with no order as to costs.

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